IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN GROSS,

Plaintiff,

v.

DEPT. OF CORRECTIONS, GARY HAMBLIN, WILLIAM POLLARD, DON STRAHOTA, MIKE MEISNER, CAPT. MURASKI, CAPT. HOLM, CAPT. OLSON, UNKNOWN SUPERVISOR, C.O. MASON, C.O. PONTOW, C.O. MARTIN, C.O. GOESER, C.O. BRADLEY, C.O. ROSENTHAL, SGT. BEASLY, and SGT. HENSLIN,

Defendants.

OPINION & ORDER

12-cv-577-wmc

In this proposed civil action, plaintiff John Gross alleges that defendant C.O. Jolene Mason sexually assaulted him repeatedly while he was in state custody and that the other named defendants failed to protect him against Mason's assault, all in violation of the Eighth Amendment of the United States Constitution. Having determined that Gross may proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, and that he has made his initial partial payment of $92.23, as required by § 1915(b)(1), the court must next determine whether Gross's proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because Gross has stated a claim for relief against certain defendants, the court will permit him to proceed and will require the state to respond.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Gross alleges, and the court assumes for purposes of this screening order, the following facts:

- Plaintiff John Gross is currently incarcerated at the Wisconsin Secure Prison Facility ("WSPF"), but at the time the alleged events, he was incarcerated at Waupun Correctional Institution and employed as a North Cell Hall "tier tender."

- In December 2010, he was approached by defendant C.O. Jolene Mason, who stated she had "had her eye on [him] for a while" and that she was going to help him get in touch with his family and find a lawyer. She then pulled him into the cell she was searching and kissed him while fondling his penis through his clothing. This encounter lasted one to two minutes. Mason then pushed him out of the cell, said they would talk soon and warned him not to tell anyone what they had done.

- A few days later, Gross brought up the encounter. Mason said she had noticed him while in another cell hall and moved to the North Cell Hall to be near him. Mason also said that her friends Sgt. Beasly, C.O. Pontow, C.O. Rosenthal and other unnamed corrections officers had said that Gross knew "how snitches were handled" at Waupun, and that she was going to fill out paperwork so that Gross would work directly for her. She handed him a pack of cigarettes, told him to find out how much they would sell for and that they'd "go from there." She kissed him again and told him not to worry about getting caught, because she knew what she was doing and "could take care of her 'friends' for [him.]"

- Over the next few weeks, Mason would tell Gross where to meet her in open cells, where she would kiss and fondle him. She also brought and handed off tobacco items and pictures of Gross's family. Mason told him to have the money from the items he sold sent to family members to prove that Mason could trust him, since this way, his family would get in trouble if he turned on her.

- On or about December 26, 2010, Mason informed Gross that another inmate, Washington, had told her that he had seen Mason and Gross embracing and was going to tell security. Mason told Gross not to worry because she had a plan; an hour later, Mason told Gross that the other inmate had been taken to segregation, allegedly for exposing himself to her. When Gross asked if it had really happened, Mason said no but that she knew those allegations would ensure he was taken to segregation immediately and that any accusations afterward would look like retaliation on his part. Mason also said she loved Gross and would not let anything separate them, and told him that if questioned, he should say that he was Mason's

"confidential informant." She then said that "no matter what, they couldn't do anything without a victim and [Gross] wasn't a victim."

- Over the next few days, Mason repeated her statement that Gross was not a victim over and over. She also reminded him that his family could get into trouble.

- Several days later, Gross was taken to the security floor, where Captain Muraski informed him that Washington was in segregation saying that he had seen Mason and Gross embracing. Muraski said that he could easily place Gross in Temporary Lockup for two to three weeks while he investigated, but that he wanted to hear what Gross had to say, as the claims were weak. Gross told Muraski that he was Mason's confidential informant, and Muraski released him after one hour, cautioning him to be more careful when giving Mason information.

- When he returned to the cell hall, Mason asked what had happened and reminded Gross that if she got in trouble, so would his family.

- Later in the week, Mason said that if Gross was ever placed in segregation, she would get a Post Office box and write to him, and would continue to help him as long as he never betrayed her. She told him the name she would use as well as several code words and phrases, and stated she would give some information (ostensibly from Gross) to Beasly, Rosenthal, and C.O. Bradley to "secure [their] time together."

- In January, Gross was brought to security. Muraski informed him that he had looked into the allegations and had "decided to believe [Gross's] story." Muraski warned him again to "cool it" with Mason, because "people are always watching." When Gross told Mason of this, she said not to worry, because she was feeding information to Beasly, Bradley, Rosenthal, Pontow, C.O. Martin, C.O. Goeser and Sergeant Henslin and claiming it came from Gross.

- The encounters between Mason and Gross continued. Mason brought items for Gross to sell and continued to tell him where to meet her so that they could kiss and Mason could fondle his penis through his clothing. Gross expressed concern about getting caught, but Mason reassured him that as long as he never said anything against her, "they'd have no victim."

- In January, Gross was taken to security for a "cause urine test." He asked Captain Holm why, and Holm responded that he "had a job to do" and that "perhaps whatever [Gross was] into in the cell hall has something to do with it." When Gross next saw Mason, he told her what had happened, and Mason said that it had been done at her orders, because she wanted to remind Gross of who he was and where he was, and that she could hurt him just as easily as she could help him.

- Over the next few weeks, Gross sought to reassure Mason by giving her information she could use to search cells. He also acquiesced when she told him she was going to

search the cell of one of Gross's cell hall associates, Guetzkow, and "during this search would find drugs."

- On or around February 12, Mason took Gross into the walkway behind the cells and performed oral sex on him. She stated that he was being rewarded for proving himself. They had approximately two more encounters like this in February.

- In March, Mason brought a cell phone into the prison and gave it to Gross so they could keep in constant contact. When Gross expressed concern about the possibility that the phone would be discovered in his cell, Mason threatened his family and wrote up warnings on Gross's cell hall warning card. She stated that "she could play games better than anyone," so Gross should trust her. Over the next few weeks, Gross did everything Mason told him to do.

- In late March, Mason left on a vacation after telling Gross "she'd have people keeping an eye" on him. Bradley and Rosenthal took him to security to discuss gang activity. Bradley stated that Mason had told him to talk to Gross. Both Bradley and Rosenthal told Gross that he had made two enemies in Guetzkow and Washington. Bradley then said laughingly, "Well, next time be more careful when messing around with Mason." Rosenthal joined in the laughter.

- After the meeting, Gross called Mason to tell her what had happened. Mason reminded Gross that she would be "checking up" on him, and that she had "eyes and ears everywhere."

- In April, Mason told Gross that she wanted to have sex with him and become pregnant with his child. Mason also informed him that she was planning to divorce her husband and retain an appeals lawyer, but she needed Gross to continue selling items she would bring in.

- On April 1, Mason brought in a new phone with internet access and told him to meet her in a cell on A-tier to have sex. After sex, Mason gave Gross the phone and said that he would be rewarded with sex, money, and a lawyer. On April 15, 16, and 17 and on May 1, they met again to have sex and discuss items that Mason needed to bring into the prison.

- In May, Gross was taken to security to meet with Lt. Clough and Security Director Don Strahota. During the meeting, they questioned him about Mason, and he relayed the confidential informant story to them. He was then taken to segregation and placed in temporary lockup for soliciting staff.

- Over the next few weeks, Clough and Strahota repeatedly questioned him, and he continued to say that he was Mason's confidential informant. They said that "just because Muraski and Gempler ignored the obvious didn't mean anything."

- During this time, Mason rented a Post Office box and wrote to him in code under the alias "Robin Miller." Mason wrote that she was still working at Waupun, was in contact with his family and he should continue to keep quiet.

- On June 4 or 5, Mason worked the third shift in segregation. She came to his cell numerous times to tell him to continue with the same story and that she had been informed by Beasly and Rosenthal that "Clough had nothing that would stick."

- On June 5, shortly after 2:00 a.m., Gross was taken out of his cell by Captain Olson and others. They took him to a strip cage and removed all his property from his cell. When he asked why it was happening, Olson said, "Strahota said you'd know what this was about." Olson also said, "You two should know better than this."

- Later that week, Mason's house was searched by the Dodge County Sheriffs. They found Gross's legal file among letters that Gross had sent to Mason's alias.

- Gross was interviewed by Prison Rape Elimination Act ("PREA") investigators. After several meetings and assurances that his family was safe both physically and legally, Gross told them what had been happening since December 2010. Mason was ultimately charged with three counts of sexual assault by correctional staff and one count of delivering illegal articles to an inmate, Dodge County Case No. 11-CF-356.

- Gross was assured that there would be no retaliation for his acknowledgement of what had happened, but on July 8, 2011, Gross was informed that he would be transferred to another institution without explanation or a hearing. Gross was later told that the transfer was per security and had been approved and arranged by Strahota and Warden William Pollard.

OPINION

I. Sexual Assault

The Eighth Amendment's prohibition of cruel and unusual punishment bars prison authorities from unnecessarily and wantonly inflicting pain on inmates. *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004). "An unwanted touching of a person's private parts, intended to humiliate the victim or gratify the assailant's sexual desires, can violate a prisoner's constitutional rights whether or not the force exerted by the assailant is significant." *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012). Indeed, the Seventh Circuit in *Washington* recognized that "[s]exual offenses[,] forcible or not[,] are unlikely to

cause so little harm as to be adjudged *de minimis*, that is, too trivial to justify the provision of a legal remedy. They tend rather to cause significant distress and often lasting psychological harm." *Id.*; *see also Sloan v. Bohlmann*, No. 09-C-883, 2009 WL 4667132, at *2 (E.D. Wis. Dec. 3, 2009) ("A sexual assault by prison staff could constitute a violation of the Eighth Amendment.").

Based on this law, the court concludes that Gross's complaint states a claim against defendant Jolene Mason for violating his Eighth Amendment rights. Gross alleges that Mason sexually touched him without his consent and coerced him into sex multiple times. From Gross's pleadings, and from his allegations of coercion, intimidation and threats against his family, the court also infers that Mason acted against Gross's will.[1] In essence, Gross has alleged a pattern of sexual assault that spanned several months. If true, this conduct could undoubtedly rise to the level of an Eighth Amendment violation.

Though Gross does not explicitly allege that Mason's actions were intended to gratify her sexual desires, the court can reasonably infer this fact based on Gross's allegations of Mason's continuous pursuit of sexual contact with Gross. Under *Washington*, it would not appear to matter that Mason apparently did not use significant force. Because he plausibly alleges that Mason sexually assaulted him, Gross may proceed on his Eighth Amendment claim against her.

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[1] There appears to be a split of authority as to whether *consensual* sexual relationships in prison can constitute an Eighth Amendment violation. *Chao v. Ballista*, 772 F. Supp. 2d 337, 347-49 (D. Mass. 2011) (collecting and comparing cases). It does not appear that the Seventh Circuit has ruled on this question, but Wisconsin law does criminalize "sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member." Wis. Stat. § 940.225(2)(h). Thus, for purposes of criminal liability under Wisconsin law, prisoners are unable to consent to sex with correctional staff.

II. Failure to Protect

Gross also accuses the other defendants of failing to protect him from Mason's misconduct in threatening, intimidating, coercing and sexually assaulting him. To state a claim based on a failure to prevent harm, an inmate must show that (1) he has been incarcerated under conditions which, objectively, posed a "substantial risk of serious harm"; and (2) prison officials actually knew of but disregarded that risk. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citations omitted); *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008). In other words, the second requirement means an inmate must allege facts showing that defendants acted with "deliberate indifference" to his health or safety. *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010) (quoting *Farmer*, 511 U.S. at 834). Conduct that "simply amounts to mere negligence or inadvertence is insufficient to justify the imposition of liability." *Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006) (quoting *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985)) (internal quotation marks omitted).

The Seventh Circuit has held that "failure to provide protection constitutes an Eighth Amendment violation only if deliberate indifference by prison officials to a prisoner's welfare 'effectively condones the attack by allowing it to happen.'" *Santiago*, 599 F.3d at 756 (quoting *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997)). To sustain an Eighth Amendment failure-to-protect claim, Gross must, therefore, allege facts sufficient to show "that the defendants had actual knowledge of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Id.* (quoting *Lewis*, 107 F.3d at 553).

Gross has certainly alleged enough to find that he was incarcerated under conditions leaving him substantially at risk of repeated sexual assault by a corrections officer. Proving

that each defendant actually knew of this risk and did nothing, however, poses more of a problem.

Gross raises claims against Sgt. Henslin, C.O. Martin and C.O. Goeser for failure to report their suspicions of Mason's behavior and failure to prevent the assaults. The problem is that Gross alleges no facts allowing the court to infer that these three defendants actually *knew* of the risk to Gross's safety. For defendants Henslin, Martin and Goeser, he alleges only that Mason was "feeding them information" and claiming it came from Gross, presumably to ensure they believed that Gross was a confidential informant and thereby to secure Mason's and Gross's story. Rather than suggesting they knew about the ongoing sexual assault, however, this suggests that Mason was actively working to keep them in the dark about her actions. Gross does not allege that anyone reported Mason's misconduct to them, nor that they had any reason to suspect the story Mason was apparently telling them was untrue and that Gross was actually in substantial danger of sexual assault. Gross also alleges that Goeser was the one who wrote up an incident report on Mason's orders, requiring him to be urine tested, but again this does not support a reasonable inference that Goeser knew Gross was at substantial risk of *harm* and disregarded that risk.[2] Therefore, Gross has not stated a failure to protect claim against Henslin, Martin and Goeser, and he will not be granted leave to proceed against them.

[2] The Eighth Amendment imposes no requirement that an official know of a specific *source* of substantial risk to inmate safety. *See Farmer*, 511 U.S. at 843-44. Thus, if Henslin, Martin and Goeser had known that Gross was at substantial risk of sexual assault (because prison officials frequently engaged in such behavior, for example), it would not matter if they had not known that Mason posed a risk to Gross in particular. That is not what has been alleged here. On the contrary, Gross alleges no facts that give rise to the inference that these defendants knew of *any* substantial risk to Gross's safety.

Gross alleges the same failure to prevent Mason from sexually assaulting him against C.O. Bradley and C.O. Rosenthal, but in their case Gross also alleges enough facts to infer that they were aware of the risk to Gross that Mason presented. In particular, Gross alleges that he had a conversation with Bradley and Rosenthal sometime in March, during which Gross was informed that he had "made enemies" because of his connection with Mason. When Gross asked them what he could do, he also alleges that both Bradley and Rosenthal laughed and said next time he should be more careful "when messing around with Mason." This alleged response at least permits an inference that Bradley and Rosenthal were aware that Gross and Mason were "messing around," and that this language and their alleged attitude seems at odds with a belief in the "confidential informant" story Mason and Gross were using at the time. Inferring that Bradley and Rosenthal were aware of the risk of sexual assault also supports an inference that they were deliberately disregarding that threat by treating it as a joke and taking no action. Given the low threshold at the screening stage, the court will, therefore, allow Gross to proceed against Bradley and Rosenthal.

Gross has alleged the same basic failure to protect claim against Sgt. Beasly and C.O. Pontow. Like defendants Martin, Henslin and Goeser, Gross alleges that Mason was feeding Beasly and Pontow information and claiming it came from Gross. In addition, Gross alleges that Beasly and Pontow were "friends" of Mason and that they had told Mason that Gross "knew how snitches were handled" at Waupun. Even reading these allegations generously, however, they do not indicate that Beasly and Pontow knew Gross was at substantial risk and failed to take action. In particular, the mere fact that Beasly and Pontow were Mason's "friends" does not permit an inference that they knew Gross was at substantial risk of being sexually assaulted by Mason. Likewise, their alleged comment to

Mason that Gross "knew how snitches were handled" does not allow for that inference. Gross does not allege that: (1) Mason ever informed them of her designs against him; (2) Mason was even known for misbehavior; or (3) Mason's "friends" would have any reason to *know* that Gross was at substantial risk. Therefore, Beasly and Pontow will be dismissed from the case as well.

Next, Gross has raised failure to protect claims against Captain Muraski for his failure to act when first hearing reports of Mason's inappropriate sexual behavior toward Gross. The central problem with Gross's claims against Muraski, however, is that based on Gross's own allegations, Muraski does not appear to have known about the risk that Mason posed to Gross's safety. To the contrary, Gross *himself* told Muraski that he was Mason's confidential informant in an attempt to conceal Mason's ongoing sexual encounters. While Gross's reluctance to disclose his encounter is certainly understandable given Mason's alleged threats, so, too, is Muraski's decision to take Gross's response at face value. Moreover, Gross alleges that Muraski *did* investigate the allegations, although he concluded that Gross's story was the one he believed. If Gross's allegations are true, Muraski certainly erred in reaching the conclusion he did at that time, but Gross has not alleged any facts showing that Muraski *knew* the truth of the situation. "An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage." *Farmer*, 511 U.S. at 837. Without knowledge of the risk, however, Muraski's conduct "cannot under [the United States Supreme Court's] cases be condemned as the infliction of punishment." *Id.* at 838. Thus, the court must dismiss Gross's claims against Muraski.

Gross also raises a failure to protect claim against Captain Holm for his alleged failure to investigate a "report given by staff which occurred after initial speculation of inappropriateness by staff on inmate to ensure no retaliation or any other violation was occurring." What Gross means by this vague, general indictment is unclear, but as the only facts he specifically alleges involving Captain Holm are that he brought Gross into security for a urine test based on Goeser's incident report, neither Holm's statements that he had a "job to do," nor that what Gross was "into" in the cell hall might have something to do with the urine test, suggest that Holm knew anything about Mason sexually assaulting Gross. Gross does not allege that Holm ever received any other report that raised the risk of sexual assault generally, much less specific to Mason. To the extent that Gross intends to bring a claim that Holm should have investigated the apparent drug allegations more thoroughly, since then he might have discovered Mason's ongoing sexual assault, this does not rise to the level of "deliberate indifference" required by the Eighth Amendment. *See Farmer*, 511 U.S. at 838 ("an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment").

Gross claims Captain Olson, an unnamed shift supervisor and Security Director Strahota also failed to protect him by permitting Mason to work in the segregation unit in which he was housed. Strahota, as one of the officials investigating the alleged relationship between Mason and Gross, would arguably have known about the risk Mason posed to Gross by the time Mason worked the third shift in segregation on June 4 or 5, and so the court will infer such knowledge.

While Gross does not specifically allege facts indicating that Olson and the unnamed shift supervisor would have had similar knowledge, Eighth Amendment case law allows a factfinder to "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. By the time Mason worked the June 4th or 5th shift in segregation, Gross had been in segregation for a "couple weeks" and allegedly questioned about Mason "numerous times," both by a prison Lieutenant and by Strahota. Given the low threshold posed by screening, the court may infer from these limited facts that by June 4th or 5th, the people in charge of Gross's unit would have known that the prison was investigating reports of a sexual relationship between Mason and Gross. The court may also infer, at least at the screening stage, that they would have known that Mason's presence where Gross was being kept posed a substantial risk to Gross's health and safety from continued sexual assaults. Thus, Gross will be allowed to proceed past the screening phase with his claims against Olson, Strahota and the unnamed shift supervisor on this admittedly slender reed.

Gross also names the Department of Corrections as a defendant, but "it is well established that the 'state,' which the DOC is for this purpose, is not a 'person'" that may be sued under 42 U.S.C. § 1983. *Witte v. Wis. Dep't of Corr.*, 434 F.3d 1031, 1036 (7th Cir. 2006) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67 (1989)). Therefore, the claims he raises against the DOC as an entity will also be dismissed.

Finally, Gross names Gary Hamblin and Mike Meisner as defendants for violations of the Eighth and Fourteenth Amendments, alleging failure to examine investigation procedures within different institutions, failure to protect inmates from sexual assault and permitting retaliatory transfers of inmates to other institutions. Liability under § 1983

arises only through a defendant's personal involvement in a constitutional violation. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). To find necessary personal involvement against a state official who has not directly deprived an individual of a constitutional right, then the official must at least (1) have known about the unconstitutional conduct, or (2) facilitated it, approved it, condoned it or turned a blind eye to it. *Id.* Gross fails to allege *any* facts relating to Meisner or Gary Hamblin, the latter of whom was at the time of the relevant events the Secretary of the Wisconsin Department of Corrections. Neither does Gross allege that Meisner and Hamblin were personally involved in the investigation of defendant Mason, in the failure to protect Gross from her or in the alleged retaliatory transfer. Nor does he allege that they facilitated, approved, condoned or turned a blind eye to such conduct. Thus, Gross's claims against Hamblin and Meisner must be dismissed as well.

III. Retaliatory Transfer

Gross also asserts additional claims against Strahota and Pollard for transferring him to another institution after speaking with the PREA investigators. Gross alleges that he was entitled to an explanation and a hearing before being transferred.

The court will dismiss these claims as Gross alleges them, because the transfer to another institution did not amount to cruel and unusual punishment, nor did it deprive him of procedural due process. As for Gross's Eighth Amendment claims, the Seventh Circuit noted in *Meisberger v. Cotton*, 181 Fed. App'x 599 (7th Cir. 2006), that a transfer to another prison does not deprive the prisoner "of the 'minimal civilized measure of life's necessities," and, therefore, the district court had properly dismissed the complaint at the screening

stage. *Id.* at 601 (quoting *Higgason v. Farley*, 83 F.3d 807, 809-10 (7th Cir. 1996) (per curiam)). Similarly, a prisoner is "not entitled to any process preceding [a] transfer unless he [has] a liberty or property interest in remaining" at his first institution. *Id.* at 600. Even assuming that Gross's new institution presented more adverse conditions of confinement (which Gross has not alleged), "the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *see also Meachum v. Fano*, 427 U.S. 215, 225 (1976) (Due Process Clause does not protect a duly convicted prisoner against transfer from one institution to another within the state prison system).

Reading Gross' allegations generously, he may have intended to allege a First Amendment retaliation claim based on his transfer. Such a claim requires a prisoner to show that: (1) he engaged in protected First Amendment activity; (2) he suffered a deprivation that would likely deter First amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in defendants' decision to take the retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). While generally, prison officials may transfer prisoners for any reason or no reason, "[o]therwise lawful action 'taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.'" *Reimann v. Frank*, 397 F. Supp. 2d 1059, 1079 (W.D. Wis. 2005) (quoting *DeWalt v. Carter,* 224 F.3d 607, 618 (7th Cir. 2000)).

Here, Gross alleges that in "retaliation" for speaking with PREA investigators, he was informed that he was to be transferred to another institution -- a transfer "approved and arranged" by Strahota and Pollard. At this early stage, these allegations are sufficient to state a claim for retaliation. *See Cornell v. Woods*, 69 F.3d 1383, 1387-88 (8th Cir. 1995)

(prisoners may not be transferred for exercising a constitutional right; prisoners have a constitutional right to answer questions concerning a misconduct investigation against a correctional officer).

Even so, Gross should be aware of the difficult burden he will need to overcome in *proving* this First Amendment retaliation claim. A plaintiff may not prove his claim with the allegations in his complaint, *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539 (7th Cir. 2007). Rather, Gross will need to come forward with admissible evidence that his First Amendment activity in speaking with investigators was a cause of the allegedly retaliatory transfer. Even when the two events occur close in time, it is rarely enough to prove an unlawful motive without additional evidence. *Sauzek v. Exxon Coal USA, Inc.,* 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second."). Without admissible evidence of an unlawful motive for the transfer, Gross will ultimately be unable to prevail on his First Amendment claim.

ORDER

IT IS ORDERED that:

1) plaintiff John Gross is GRANTED leave to proceed on his Eighth Amendment cruel and unusual punishment claim against defendant Jolene Mason; his Eighth Amendment failure to protect claims against defendants C.O. Bradley, C.O. Rosenthal, Captain Olson, shift supervisor John Doe and Security Director Strahota; and his First Amendment retaliation claim against Security Director Strahota and Warden William Pollard, consistent with the opinion above.

2) Plaintiff is DENIED leave to proceed on any other claims.

3) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.

4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendant's attorney.

5) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 14th day of January, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge